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7  
8 **UNITED STATES DISTRICT COURT**

9 **CENTRAL DISTRICT OF CALIFORNIA**

10 BENJAMIN PAPARELLA, MARK KAM,  
11 ALEX KUZNETSOV, individually and on  
behalf of other members of the general  
12 public similarly situated,

13 Plaintiff,

14 vs.

15 JP MORGAN CHASE BANK,  
NATIONAL ASSOCIATION and DOES 1  
16 through 50, inclusive,

17 Defendant.

**CASE NO. SACV 11-01053 AG (MLGx)**  
**CLASS ACTION**

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
PLAINTIFFS' MOTION TO REMAND  
FOR LACK OF SUBJECT MATTER  
JURISDICTION**

ACCOMPANYING DOCUMENTS:  
Notice of Motion; Declaration of Edward J.  
Wynne

**[28 U.S.C. § 1447]**

Date: September 26, 2011

Time: 10:00 a.m.

District Judge: Hon. Andrew J. Guilford

Room: 10D

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1 **I. STATEMENT OF ISSUES**

2 Whether this putative class action should again be remanded to state court, given  
 3 the following facts, which demonstrate the impropriety of Defendant's removal,  
 4 premised on both diversity jurisdiction, codified in relevant part at 28 U.S.C. § 1332(a)  
 5 and The Class Action Fairness Act of 2005 ("CAFA"), codified in relevant part at 28  
 6 U.S.C. § 1332(d), given that:

7 (1) The complaint specifically disclaims each Plaintiffs' damages above  
 8 \$75,000;

9 (2) Defendant again improperly seeks to expand the class definition and  
 10 includes persons who are not members of the class;

11 (3) Defendant does not set forth facts sufficient to show, by either a legal  
 12 certainty or a preponderance of the evidence, that the named Plaintiffs' amount in  
 13 controversy meets the \$75,000 jurisdictional minimum;

14 (4) The complaint specifically alleges the amount in controversy including  
 15 damages, restitution, attorney fees, penalties, and value of injunctive relief sought does  
 16 not exceed \$5,000,000;

17 (5) Defendant does not set forth facts sufficient to show by a legal certainty that  
 18 the amount in controversy exceeds \$5,000,000.00 jurisdictional minimum; and

19 (6) Defendant does not set forth evidence in support of its claim that Plaintiffs'  
 20 allegations were not made in good faith.

21 **II. PROCEDURAL BACKGROUND**

22 This is the third time Defendant has removed the action to this Court.

1           **A.     First Removal Attempt.**

2           On May 5, 2010, Plaintiff filed a proposed Class Action Complaint in the  
3 Orange County Superior Court of California predicated on violations of California law  
4 regarding the classification of Defendant's Business Bankers as exempt as opposed to  
5 non-exempt. The proposed class definition was (and is):

6                     All current and former California based employees of JPMorgan  
7 Chase Bank, National Association, with the title "Business Banker"  
8 who worked at any time from September 25, 2008 up to the time the  
class is certified.

9 (Def. Not. of Removal, Ex. A, Complaint, ¶ 14; Ex. B, FAC, ¶ 16.)

10           The complaint (and FAC) allege that "[t]he amount in controversy including  
11 damages, restitution, attorney fees, penalties, and value of injunctive relief sought does  
12 not exceed \$5,000,000." (Def. Not. of Removal, Ex. A, Complaint, ¶ 4; Ex. B ¶ 6.)  
13 On June 15, 2010, Defendant filed a Notice of Removal. Defendant's removal was  
14 premised solely on The Class Action Fairness Act of 2005 ("CAFA"), codified in  
15 relevant part at 28 U.S.C. § 1332(d).

16           On August 30, 2010, Plaintiffs' Motion to Remand was granted and the matter  
17 was sent back to the Orange County Superior Court for further proceedings. In granting  
18 Plaintiffs' Motion to Remand, this Court found that Defendant must satisfy the "legal  
19 certainty" standard enunciated in *Lowdermilk v. U.S. Bank Nat'l Ass'n.* (9th Cir.2007)  
20 479 F.3d 994, 998 due to the fact that Plaintiff had specifically plead an amount in  
21 controversy less than the jurisdictional minimum for federal jurisdiction under CAFA.  
22 (Wynne Decl. Ex. 1, Order Granting Plaintiffs' Motion to Remand, August 30, 2010.)  
23  
24

1 This Court analyzed the evidence offered by Defendant in support of its opposition to  
 2 Plaintiffs' Motion to Remand and found that it did not meet the legal certainty standard:

3 The only evidence presented by Defendant is the single page  
 4 Declaration of Tiffany A. Harris ("Harris Decl."). In her Declaration,  
 5 Ms. Harris provides approximate numbers for work hours and pay of  
 6 "employees holding a business banker *or similar title*." (Harris Decl.  
 7 ¶¶ 3-4 (emphasis added).) But the Complaint only addresses "business  
 8 bankers." Defendants cannot meet the legal certainty test by  
 9 expanding the class beyond the class definition contemplated in the  
 10 Complaint. Further, the Declaration does not identify the weeks or  
 11 hours actually worked by the employees. Instead, it states that  
 12 "employees holding a business banker or similar title typically work  
 13 40 or more weeks per year," "typically work five or more days a  
 week," and their work days are "typically longer than five hours." The  
 Declaration contains no exhibits listing the number of employees or  
 the hours worked during the class period. Nor does it break down the  
 estimates based on "business bankers" or "similar titles." This  
 evidence is not sufficient to meet the legal certainty standard. *See*  
*Lowdermilk*, 479 F.3d at 1001 ("absent more concrete evidence, it is  
 nearly impossible to estimate with any certainty the actual amount in  
 controversy").

14 (Wynne Decl., Ex. 1, Order Granting Plaintiffs' Motion to Remand, Emphasis added.)

#### 15 **B. Second Removal Attempt.**

16 On October 8, 2010, Defendant filed a Motion to Strike Class Allegations in  
 17 state court. The only basis for the motion was the *factual* allegation that Plaintiff did  
 18 not hold the "Business Banker" title. (Wynne Decl., Ex. 2, Notice of Motion, p. 1:11-  
 19 13; Memo., p. 1:22-24.) Defendant made no other argument in support of its Motion to  
 20 Strike the Class Allegations. The state court denied Defendant's Motion to Strike.

21 On December 20, 2010, Chase again removed the action to this Court.  
 22 Defendant's removal was premised on the false claim that Plaintiff Paparella did not  
 23 hold the title "Business Banker" and that the California Superior Court had denied  
 24

1 Defendant's Motion to Dismiss Class Allegations by allegedly finding that the class  
 2 definition included both "Business Bankers" and persons of "similar title." This Court  
 3 ordered Defendant to show cause why the case should not be remanded for lack of  
 4 jurisdiction. As noted by this Court's February 28, 2011 Order, the findings of this  
 5 Court at that time were:

6 Plaintiff contested Defendant's allegation that he had not been employed as  
 7 a Business Banker. To support his argument, Plaintiff cited a number of  
 8 documents: (1) A Performance Action Plan dated November 29, 2009,  
 9 listing his current position as "Business Banker;" (2) a Performance Action  
 10 Plan dated November 17, 2009, listing his current position as "Business  
 11 Banker;" (3) a Performance Improvement Notice dated July 31, 2009, listing  
 his current title as "Business Banker;" (4) his business card listing his  
 current title as "Business Banker;" and (5) his Personal Incentive Calculator  
 dated February 2, 2010, listing his title as "Business Banker."

12 Based on the evidence presented by both parties, it appears likely that the  
 13 Superior Court denied the Motion to Strike because the court concluded  
 that the Complaint sufficiently alleges Plaintiff **is a Business Banker**.  
 14 (Complaint ¶1.) And while it is not completely clear that this was the  
 Superior Court's reasoning behind its ruling, Defendant's interpretation of  
 15 the Superior Court's one-line denial is pure conjecture based on the  
 evidence submitted by the parties. Nothing on the record shows that the  
 16 class has been expanded to include those who hold the title "Mgr-Small  
Bus. Relationship."

17 (Wynne Decl., Ex. 3, pp. 4-5.) (Emphasis added.)

18 Based upon such findings, this Court rightfully concluded as follows:

19 ...the Superior Court's denial of the Motion to Strike appears to support  
 20 Plaintiff's contention that Plaintiff **is a Business Banker**. The Court  
 declines to read the Superior Court's decision as redefining the putative  
 21 class to include additional class members. Nor does the Court believe that  
 Plaintiff ever acknowledged that he was not a Business Banker. Thus,  
 22 nothing of substance has changed since this Court's previous remand of this  
 case, and events do not reveal any new ground for removal jurisdiction.  
 23 Defendant's motion must fail.



1 (Wynne Decl., Ex. 3, pg. 6.)(Emphasis added.)

2 Thus, on two separate occasions, this Court has rebuffed Defendant's effort to  
3 manufacture a claim that the class definition in this action included any persons other  
4 than "Business Bankers."

5 **C. Third and Current Removal Attempt.**

6 On April 14, 2011, Plaintiff amended the Complaint to include two additional  
7 class representatives. On June 10, 2011, Plaintiffs served responses to Defendant's  
8 state court discovery requests. Defendant filed the current removal on July 13, 2011.  
9 For the third time in this Court, Defendant seeks to improperly expand the class  
10 definition past that of "Business Banker" so as to over-inflate the size of the class, over-  
11 inflate the alleged potential damages of the named Plaintiffs and over-inflate the alleged  
12 potential damages of the entirety of the class in an effort to obtain federal jurisdiction  
13 where none exists.

14 Although omitted by Defendant, Plaintiffs hereby provide this Court the  
15 evidence conclusively showing that Plaintiffs' class definition is and always has been  
16 "Business Bankers." Plaintiffs also provide records produced by Defendant in this  
17 action, establishing that none of the named Plaintiffs' claims for damages meet the  
18 minimum threshold of \$75,000. Lastly, as with the second occurrence before this  
19 Court, Defendant's removal is untimely as nothing of significance has changed between  
20 the time this case was remanded on February 28, 2011 and Defendant's third removal  
21 on July 13, 2011. Lastly, like its prior attempts, Defendant has again failed to prove  
22 damages excessive of the statutory limits under CAFA.  
23  
24

1                   **1. Defendant Withheld Evidence From This Court Which**  
2                   **Establishes That Plaintiffs' Class Definition Remains**  
3                   **"Business Bankers."**

4                   As it always has been for each of the three removals by Defendant, Plaintiffs'  
5                   class definition in this action is "Business Bankers." (Def. Notice of Removal, Ex. A, ¶  
6                   1, Ex. B, ¶¶ 1, 2, 3.) Despite this Court so finding on two occasions, Defendant again  
7                   unilaterally seeks to change the class definition. Defendant's sole contention in support  
8                   of its claim is a state court discovery response by Class Representative Paparella which  
9                   Defendant claims expands the class definition. (Defendant's Notice of Removal, pg.  
10                  17:18-20) Such claim is demonstrably false. Defendant's request for admission No. 7,  
11                  demanded:

12                  Admit that the PUTATIVE CLASS is defined in YOUR COMPLAINT to  
13                  include only those EMPLOYEES holding the official title of "Business  
14                  Banker" during the RELATIVE TIME PERIOD.

15                  (Def. Notice of Removal, Ex. G, Gonnell Decl., Ex. 7, page 205.)

16                  Plaintiffs' response to the request for admission was the following:

17                  Objection. Plaintiff Objects that this request for admission is overly broad,  
18                  unduly burdensome and oppressive. Plaintiff objects to this request for  
19                  admission on the grounds that it is vague, ambiguous, and unintelligible as  
20                  to the term "official title." Plaintiff objects to this request for admission to  
21                  the extent that it calls for a legal conclusion or opinion. Plaintiff objects to  
22                  the request on the grounds that it calls for speculation. Without waiving  
23                  and subject to said objections, Plaintiff responds as follows: Deny.

24                  (Def. Notice of Removal, Ex. G, Gonnell Decl. Ex. 8, page 216-217.)

                  At no time did Defendant attempt to clarify its request for admission through  
                  meet and confer efforts, nor seek to compel a supplemental response. (Wynne Decl. ¶  
                  12.) Defendant fails to inform or provide to this Court the fact that, at Defendant's

1 demand, Plaintiff also provided a response to California Form Interrogatory No. 17.1,  
2 as to request for admission No. 7, which requires a response for each denial of an  
3 admission, including providing all facts on which said denial is made. Plaintiffs'  
4 response provided the facts on which the denial was based as follows:

5       The class definition at paragraph 16 in the First Amended Complaint is as  
6 follows: "All current and former California based employees of JPMorgan  
7 Chase Bank, National Association, with the title "Business Banker" who  
8 worked at any time from September 25, 2008 up to the time the class is  
9 certified."

(Wynne Decl., Ex. 4.)

10       Thus, Plaintiffs explained the reason for the denial of the request for admission,  
11 expressly explaining that the class definition remains those persons with the title  
12 "Business Banker." Furthermore, Defendant fails to inform the Court that Plaintiff  
13 admitted that the class definition does not include employees holding the title "Mgr-  
14 Small Bus. Relationship." (Def. Not. of Motion, Ex. G, Gonell Decl., Ex 8 thereto, pg.  
15 217.)

16       Lastly, Defendant overlooks Paparella's responses to discovery wherein  
17 Paparella asserts that he first held the Small Business Relationship Manager title and  
18 then the Business Banker title, but that only the "Business Banker" title is at issue in  
19 this action. (Def. Not. of Removal, Ex. G, Gonnel Decl., Ex. 5 thereto, Def. Special  
20 Interrogatories Nos. 1, 2; Ex. G, Gonnel Decl, Ex. 6 thereto, Pl. Paparella's Response to  
21 Special Interrogatories Nos. 1, 2.)

22       Thus, there has been no change in the definition of the class at any time.  
23 Plaintiffs have admitted that the class does not include persons holding the title of  
24

1 Small Business Relationship Manager. Further, as shown below, each named class  
2 representative Plaintiff was a Business Banker for Defendant. Despite these facts,  
3 Defendant continues to attempt to expand the class definition to include persons not in  
4 the class in an attempt to over-inflate the amount in controversy to satisfy jurisdiction.

5 **2. Defendant Failed to Produce Evidence to This Court Which**  
6 **Establishes When Each Class Representative Was A Business**  
7 **Banker.**

8 Even more egregious than ignoring Plaintiffs' class definition is Defendant's  
9 failure to produce documents to this Court which evidences when each named class  
10 representative Plaintiff was a Business Banker. As previously provided to this Court by  
11 Plaintiff in Opposition to Defendant's Response to the Court's OSC Re: Defendant's  
12 Second Notice of Removal (and as identified by this Court in its February 28, 2011  
13 Order Remanding Case for Lack of Jurisdiction), documents **produced by Defendant**  
14 from Paparella's personnel file show that Paparella held the title "Business Banker" at  
15 Chase:

- 16 • Document JPMC-P0000045: In the Performance Action Plan dated  
17 November 29, 2009, next to the category "Current Position," the title  
18 "Business Banker" is listed (underneath Mr. Paparella's name) (Wynne  
19 Decl., Ex 5.)
- 20 • Document JPMC-P0000047: In the "Branch Business Banking  
21 Performance Action Plan dated November 17, 2009, Plaintiff's current  
22 position is listed as "Business Banker." (Wynne Decl., Ex. 5.)
- 23 • Document JPMC-P0000049: In the "Performance Improvement Notice"  
24 dated July 31, 2009, Plaintiff's title is listed as "Business Banking Officer."  
(Wynne Decl., Ex. 5.) Moreover, the content of the document discuss the  
"2009 Business Banker Objectives" relevant to Mr. Paparella and adds,  
"These activities will assist Ben in improving his overall performance in the  
*Business Banker* job." (Emph. added.) (*Id.*)

1                   Additionally (also previously noted in this Court's February 28, 2011 Order)  
2  
3       Paparella is in possession of other documents generated during his employment with  
4       Chase that show his title as "Business Banker" including:

- 5               • Plaintiff's Chase business card listing his title as "Business Banker."  
6               (Wynne Decl., Ex. 6.)
- 7               • In Plaintiff's "Personal Incentive Calculator" dated February 2, 2010, next  
8               to "Employee Type," the title of "Business Banker" is listed. (Wynne Decl.,  
9               Ex. 6.)

10           Thus, by the records produced by Defendant to date, the earliest date reflected in  
11       the records as to when Paparella was a "Business Banker" for Defendant was July 31,  
12       2009. This is also consistent with Defendant's records produced for the instant motion,  
13       showing that Paparella was "reclassified" as of July 1, 2009. (See, Def. Not. of  
14       Removal, Ex. D, Harris Decl., Ex. 5 thereto, pg. "96" "Salary-related Job History.")

15           Similarly, records produced **by Defendant** for Plaintiffs Kam and Kuznetsov are  
16       equally clear, showing that both of these class representatives were "reclassified" as  
17       "Business Bankers" on July 1, 2010. (Wynne Decl., Exs. 7, 8.)

18           Not only did Defendant fail to provide this evidence to the Court, Defendant has  
19       deliberately ignored the dates on which both Paparella and Kuznetsov first held the  
20       Business Baker job code in an attempt to over-inflate potential damages in this action.  
21       As noted below, in attempting to calculate alleged damages for Paparella and  
22       Kuznetsov, Defendant has attempted to include a significant period of time during  
23       which neither Plaintiff held the job code of Business Banker.  
24

1                   **3. Nothing of Significance Has Changed Giving Rise to Removal**  
2                   **Jurisdiction.**

3           Just as was the case with Chase's second Removal, nothing of significance has  
4 changed between the time this case was remanded for the second time on February 28,  
5 2011 and Defendant's third removal on July 13, 2011. Because nothing of significance  
6 has changed, Defendant's second removal is untimely. As previously noted by this  
7 Court's February 28, 2011 Order Remanding the action:

8           ...the Ninth Circuit interprets Section 1447 (d) as requiring a defendant to  
9 show that "subsequent pleadings or events reveal a new and different  
10 ground for removal." *Kirkbridge v. Continental Casualty Co.*, 933 F.2d  
11 729, 732 (9th Cir. 1991). The Seventh Circuit takes an even stronger  
12 approach, stating that "[m]ultiple removals could encounter problems -  
could even lead to sanctions - if nothing of significance changes between  
the first and second tries." *Benson v. 51 Handling 5Ys., Inc.*, 188 F.3d  
780,783 (7th Cir. 1999) (citations omitted).

13 (Exhibit 3, pg. 3.)

14           Plaintiffs' prior Opposition to Defendant's Response to this Court's OSC  
15 pointed out the holding of *Erb v. Alliance Capital Management, L.P.* (7<sup>th</sup> Cir. 2005) 423  
16 F.3d 647, a case remarkable similar to the one at bar, wherein, at the federal court,  
17 Plaintiffs' motion to remand was granted. In state court, plaintiff then amended the  
18 complaint to add a new plaintiff and amended the complaint to clarify the existing  
19 causes of action. Defendant removed the case based on the amendments and plaintiff  
20 brought another motion to remand which was granted. Defendant appealed. The Court  
21 of Appeal determined that the time for the defendant's appeal was based on the district  
22 court's first order unless "circumstances have changed significantly":  
23  
24

1 Unless the circumstances have changed significantly since the entry of  
2 the original order, we will deem the notice an appeal from that order,  
3 even though it may designate a later order as the order being appealed.  
4 (Citation.) In such a case, the notice of appeal will be timely only if  
5 filed within 30 days of the entry of the original order. (Citations.)  
6 Alliance filed its notice of appeal more than 30 days after the entry of  
7 the district court's first remand order. Thus, the timeliness of  
8 Alliance's appeal turns on whether the circumstances have changed  
9 sufficiently since the entry of the first order.

10 (*Erb v. Alliance Capital Management, L.P.*, *supra*, 423 F.3d at 650-651.)

11 In *Erb*, the Court of Appeal determined that amending a complaint to add a new  
12 plaintiff or refining the language of the breach of contract claim were not significant  
13 enough to enlarge the time for filing an appeal because the same arguments defendant  
14 presented were the same ones it could have presented before. (*Id. at 652.*) The Court  
15 of Appeal dismissed the appeal for want of appellate jurisdiction. (*Id. at 653.*)

16 Here, Plaintiff has amended the complaint to add two new representative  
17 Plaintiffs. The purpose of the amended complaint was to provide additional persons  
18 whom Defendant had titled "Business Bankers." (Wynne Decl., Ex. 9, Motion to  
19 Amend, pp. 1-2.) As noted in *Erb*, such amendment was not significant enough to  
20 enlarge the time for filing an appeal because the same arguments defendant presented  
21 were the same ones it could have presented before. (*Id. at 652.*) Further, providing  
22 discovery responses which are entirely consistent with Plaintiffs' "Business Banker"  
23 class definition and the prior claims of the Complaint are not "changes" nor are they of  
24 any significance. *Hollingshurst v. Lacoste USA* 2010 WL 2630365 (C.D.Cal.,2010) at  
\*4-5. In *Hollingshurst*, defendant claimed that receipt of discovery responses from  
plaintiff re-triggered the 30 day statute as it was only at that time that defendant could



ascertain the amount of off-the-clock work and missed meal and rest breaks being claimed. In denying this assertion, the court stated:

[D]efendant's argument that it was only able to ascertain removability for the first time upon receipt of plaintiff's discovery responses fails, because the new information did not reveal any additional facts that defendant needed to ensure that the amount in controversy would exceed CAFA's \$5 million threshold. Moreover, because the case still involves the same claims brought on behalf of the same putative class on the same set of facts as when the case was originally filed, plaintiff's discovery responses did not change the nature of the case such that a resetting of the removal clock would be warranted.

*Id.* at \*5.

Similarly here, Plaintiffs' discovery responses did not change any of the claims or facts alleged in the Complaint (or First Amended Complaint). Defendant could have removed as to Plaintiff Paprarella on the grounds of individual diversity jurisdiction as of the time of the filing of the original Complaint and as to Kuztensov as of the filing of the Amended Complaint. Defendant failed to timely file its removal as to both Plaintiffs. As there have be no changes to this case, and certainly no significant changes that would restart the clock on Defendant's right to remove the action per 28 USC § 1446(b), Defendant has no basis to remove the action again and its third removal is both without basis and untimely.

### III. LEGAL ANALYSIS.

#### A. Defendant has the Burden to Establish Removal Jurisdiction Under Diversity Jurisdiction.

There is a strong presumption **against** the exercise of removal jurisdiction. *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9<sup>th</sup> Cir. 1992) (emphasis added). The removal statute



1 is strictly construed, and the court must reject federal jurisdiction if there is **any doubt**  
2 as to whether removal was proper. *Duncan v. Stuetzle*, 76 F.3d 1480, 1485 (9<sup>th</sup> Cir.  
3 1996) (emphasis added); 28 U.S.C.A. §§ 1441 *et seq.*, 1447(c). Any doubts as to  
4 removability are resolved in favor of remanding the case to state court. *Gaus, supra*,  
5 980 F.2d at 566. If at any time before final judgment it appears that the district court  
6 lacks subject matter jurisdiction over a case that has been removed to federal court, the  
7 case must be remanded. 28 U.S.C. § 1447(c).

8  
9 **B. The Amount In Controversy for each Named Plaintiff Is Far Less**  
10 **Than \$75,000 Under Either the Legal Certainty or Preponderance of**  
11 **Evidence Standards.**

12 Defendant concedes that Plaintiffs' Amended Complaint seeks less than the  
13 \$75,000 jurisdictional minimum for each named Plaintiff. (Def. Not. Of Removal, pg.  
14 9.) Defendant also admits that, where the complaint is brought as a class action and  
15 disclaims damages in an amount over both \$75,000 for each plaintiff and \$5 million as  
16 to the class, district courts are split as to whether to apply legal certainty standard (*Site*  
17 *Mgmt. Solutions, Inc. v. TMO CA/NV, LLC*, 2011 WL 1743285, at \*3 (C.D.Cal. May 4,  
18 2011); *Lara v. Trimac Transp. Servs., Inc.* 2010 WL 3119366, \*1 (C.D. Cal. Aug 6,  
19 2010)) or the preponderance of evidence test (*Lyon v. W.W. Grainger, Inc.* 2010 WL  
20 1753194, \*1-2 (N.D. Cal. Apr. 29, 2010)). Regardless of which test is applied here,  
21 however, Defendant's assertion that either or both Paparella and/or Kuznetsov's  
22 individual amount in controversy exceeds \$75,000 is demonstrably false.

23 **1. Kuznetsov's Individual Claims are less than \$75,000.**  
24

1 Defendant has ignored the date on which Kuznetsov was reclassified by  
2 Defendant as a "Business Banker." Specifically, Defendant improperly asserts that  
3 Kuznetsov "was employed from September 25, 2008 [] through October 14, 2010,  
4 when he was terminated." (Def. Not. of Removal, pg. 9:23-25.) Notably, Defendant  
5 does not differentiate the dates on which Kuznetsov held positions other than the one  
6 position at issue here. Using those dates, Defendant asserts that Kuznetsov worked 465  
7 days, after vacation and bank holidays and that, therefore, his amount in controversy  
8 exceeds \$75,000.

9  
10 In reality, as demonstrated by Defendant's own documents, Kuznetsov was only  
11 employed as a Business Banker between July 1, 2010 and October 14, 2010. (Wynne  
12 Ex. 8.) Using the appropriate dates, Defendant's own records submitted with the  
13 Notice of Removal show that Kuznetsov worked a total of 65 work days between those  
14 dates after subtracting 10 recorded vacation days, 3 recorded sick days and 3 holidays.  
15 (Def. Not of Removal, Ex. D, Harris Decl., Ex. 2, thereto, Wynne Decl., ¶ 13.) When  
16 applying the actual days worked by Kuznetsov, the total amount in controversy is  
17 \$20,610.83, far under the statutory minimum.

18 **i. Overtime.**

19 Using Defendant's figure of 1.5 hours of overtime per day and the overtime rate  
20 of \$54.81 per hour of the 65 days worked as a Business Banker, results in \$5,343.97:

21 
$$65 \text{ work days} \times 1.5 \text{ hours OT} \times \$54.81 = \$5,343.97.$$

22 **ii. Meal Breaks.**

Using Defendant's figure of 4 days per week of missed meal breaks and the regular rate of \$36.54 per hour for the 65 days worked as a Business Banker, results in \$1,900.08:

$$65 \frac{4}{5} \text{ missed meals/week} \times \$36.54 = \$1,900.08.$$

**iii. Rest Breaks.**

Defendant mistakenly inflates the potential amount in controversy by "double-counting" meal and rest breaks for each day. An employee is only entitled to one additional hour's wages per day, even if denied both a rest and meal period during that day. *Roth v. Comerica Bank* --- F.Supp.2d ----, 2010 WL 6982510, \*8 (C.D.Cal. 2010); *Lyon v. W.W. Grainger, Inc.*, 2010 WL 1753194, \*4 (N.D.Cal. 2010). Thus, even assuming Kuznetsov missed every rest period for every day, as Defendant has already sought the hourly wage incurred for 4 out of 5 days for missed meal periods, at best the potential amount in controversy for Kuznetsov is one additional hour of pay for the 5<sup>th</sup> day on which he potentially had a meal break, but missed his rest break(s), resulting in an amount in controversy for missed meal periods of \$475.02:

$$65 \frac{1}{5} \text{ missed rest periods} \times \$36.54 = \$475.02.$$

**iv. Waiting Time Penalties.**

$$\$36.54/\text{hour} \times 8 \text{ hours/ day} \times 30 \text{ days} = \$8,769.60$$

**v. Attorneys' Fees.**

"[D]istrict courts in this circuit have disagreed [as to] whether attorneys' fees incurred after the date of removal are properly included in the amount in controversy: some courts refuse to consider attorneys' fees incurred after removal whereas others

1 include a “reasonable estimate of attorneys['] fees likely to be expended.” *Burk v. Med.*  
2 *Sav. Ins. Co.*, 348 F.Supp.2d 1063, 1068-69 (D.Ariz.2004) (comparing *Faulkner v.*  
3 *Astro-Med, Inc.*, 1999 WL 820198, at \*4 (N.D.Cal. Oct.4, 1999) and *Conrad v.*  
4 *Hartford Accident & Indemnity Co.*, 994 F.Supp. 1196, 1200 (N.D. Cal. 1998) with  
5 *Brady v. Mercedes-Benz USA, Inc.*, 243 F.Supp.2d 1004, 1010-11 (N.D.Cal.2002) and  
6 *Simmons v. PCR Tech.*, 209 F.Supp.2d 1029, 1034-35 (N.D.Cal.2002)). Moreover,  
7 given that this is Defendant’s third removal, it begs the question of whether the Court  
8 should look at fees at the time of the first, second or third removal. Regardless, any  
9 attorneys’ fees would be de minimus at this time. Moreover, Defendant has provided no  
10 evidence of the hours or tasks performed by Plaintiffs’ counsel and provided no  
11 evidence of the expected attorneys’ fees as to Plaintiffs’ individual claim. Hence,  
12 Defendant has not met its burden. Even if the Court were to consider these initial  
13 attorneys’ fees on a case-wide basis, Plaintiffs’ pro rata share at this time would be even  
14 smaller given that the attorney’s fees must be attributed to all members of the class in a  
15 class action for purposes of determining the amount in controversy. *Gibson v. Chrysler*  
16 *Corp.* 261 F.3d 927, 941-42 (9<sup>th</sup> Cir. 2001).

18 More importantly, estimates of attorneys’ fees must not leave substantial doubt  
19 and must be more than speculative to meet Defendant’s burden of proving the amount  
20 in controversy. *Sanchez v. Monumental Life Ins. Co.* 102 F.3d 398, 404 (9<sup>th</sup> Cir. 1996);  
21 *Singer v. State Farm Mut. Auto. Ins. Co.* 116 F.3d 373, 377 (9<sup>th</sup> Cir. 1997); *Gaus* at  
22 567; *Surber v. Reliance National Indemnity Co.*, 110 F.Supp.2d 1227, 1232 (N.D. Cal.  
23 1999). Here, Defendant provides no evidence whatsoever, instead compounding  
24

1 speculation upon speculation as to a potential recovery for attorneys' fees. Defendant's  
2 sole "estimate" is that there "may" be a recovery of 25% of the total amount as  
3 attorneys' fees. Plaintiffs dispute that Defendant has put any attorneys' fees in to  
4 controversy as Defendant's estimate is pure speculation. Even if the Court was to adopt  
5 Defendant's proposed 25% "benchmark," however, that provides for only \$4,122 in  
6 attorneys' fees ( $\$16,488.67 * 0.25$  ). Thus, Kuznetsov's entire potential amount in  
7 controversy, even including the speculative attorneys' fees, would be \$20,610.83.

8  
9 **2. Paparella's Individual Claims are less than \$75,000.**

10 Defendant wants it both ways. As noted by this Court's February 28, 2011  
11 Order Re: OSC, Defendant brought a Motion to Strike in state court "based on the  
12 allegation that Plaintiff was not a Business Banker and could therefore not serve as the  
13 class representative." (Wynne Decl., Ex. 3, pg. 4.) Now, Defendant asserts that  
14 Paparella was a business banker at all times from September 2008 to February 2010.  
15 (Def. Not. of Removal, pg. 12:14-16.) Defendant should be precluded from making  
16 this argument under the doctrine of collateral estoppel. Even if not estopped from this  
17 argument, Defendant's own documents and Paparella's discovery responses belie this  
18 claim. As previously noted, Paparella's discovery responses asserts that he held the  
19 Small Business Relationship Manager title and then the Business Banker title, but that  
20 only the "Business Banker" title is at issue in this action. (Def. Not. of Removal, Ex. G,  
21 Gonnel Decl., Ex. 5 thereto, Def. Special Interrogatories Nos. 1, 2; Ex. G, Gonnel Decl,  
22 Ex. 6 thereto, Pl. Paparella's Response to Special Interrogatories Nos. 1, 2.)  
23 Defendant's own documents establish that Paparella was a Business Banker and that he  
24

1 was likely reclassified to that position as of July 1, 2009. (Wynne Decl. Ex's. 5, 6, Def.  
2 Not. of Removal, Ex. D, Harris Decl., Ex. 5 thereto, pg. "96" "Salary-related Job  
3 History" noting July 1, 2009 "Reclassification.") Thus, while Defendant should be  
4 collaterally estopped from now claiming that Paparella was a Business Banker at all  
5 times from September 2008 to February 2010, the records show that, at most, Paparella  
6 was a Business Banker from July 1, 2009 to February 4, 2010. Using Defendant's pay  
7 records (Def. Not. of Removal, Harris Decl., Ex. 4) show that between July 1, 2009 and  
8 February 4, 2010, Paparella would have worked a total of 140 work days after  
9 subtracting 8 holidays, 6 recorded vacation days and 3 recorded sick days. (Wynne  
10 Decl. ¶ 12.) When applying the actual days worked by Paparella, the total damages  
11 would be at best, \$32,672, far under the statutory minimum.  
12

13 **i. Overtime.**

14 Using Defendant's figure of 1.5 hours of overtime per day and the overtime rate  
15 of \$56.41 per hour of the 140 days worked as a Business Banker, results in \$11,846.10:

16 
$$140 \text{ work days} \times 1.5 \text{ hours OT} \times \$56.41 = \$11,846.10.$$

17 **ii. Meal Breaks.**

18 Paparella customarily and regularly did not receive a full 30-minute uninterrupted  
19 meal period where he was relieved of all duties. On that basis, Defendant assumes that  
20 Paparella never received a meal break. While this interpretation is debatable, even using  
21 Defendant's figure of 5 days per week of missed meal breaks and the regular rate of  
22 \$37.61 per hour for the 140 days worked as a Business Banker, results in \$5,265.40:  
23

24 
$$140 \times 1 \text{ missed meals/day} \times \$37.61 = \$5,265.40.$$

1                    **iii.     Rest Breaks.**

2            Defendant again mistakenly “double-counts” meal and rest breaks for each day. A  
3 Defendant has already taken the maximum penalty for Paparella for 5 missed meal  
4 periods per week, there is no additional amount in controversy to be added for rest  
5 periods for Paparella.

6                    **iv.     Waiting Time Penalties.**

7                    \$37.61/hour x 8 hours x 30 days = \$9,026.40

8                    **v.     Attorneys’ Fees.**

9                    Plaintiffs again dispute that Defendant has put any attorneys’ fees in to  
10 controversy as Defendant’s estimate is pure speculation. Even if the Court was to adopt  
11 Defendant’s proposed 25% “benchmark,” however, that provides for only \$6,534 in  
12 attorneys’ fees (\$26,137.90 \* 0.25 ). Thus, Paparella’s entire potential amount in  
13 controversy, even including the speculative attorneys’ fees, would be **\$32,672.**

14                    As neither Kuznetsov or Paparella’s amounts in controversy are even close to the  
15 statutory minimum, Plaintiffs respectfully request that the Court issue an order  
16 remanding this action back to the state court.

17  
18                    **C.     Defendant Again Fails To Prove That The Amount In Controversy**  
19                    **Pursuant to the Class Action Fairness Act Exceeds The Statutory**  
20                    **Limit.**

21                    “[U]nder CAFA the burden of establishing removal jurisdiction remains, as  
22 before, on the proponent of federal jurisdiction.” *Abrego Abrego v. Dow Chemical Co.*,  
23 443 F.3d 676, 685 (9th Cir.2006). The removal statute is strictly construed against  
24

1 removal jurisdiction, and "[f]ederal jurisdiction must be rejected if there is any doubt as  
2 to the right of removal in the first instance." *Gaus, supra*, at 566 (9th Cir.1992).

3 The Ninth Circuit has identified different burdens of proof for establishing  
4 removal jurisdiction in the CAFA context, depending on what has been pled in the  
5 Complaint. This Court has previously ruled that the "legal certainty" standard applies  
6 to Plaintiffs' Complaint as it specified an amount in damages of less than \$5,000,000  
7 for the class. (Wynne Decl. Ex. 1, pg. 3.) There has been no change in the pleadings so  
8 as to change this standard of review and the First Amended Complaint contains  
9 identical language as to the amount of damages. (Def. Not. of Removal, Ex's. A, B.)  
10 As such, Defendant must prove that Plaintiff is legally certain to recover at least  
11 \$5,000,000. Defendant falls far short of the required standard of review as it has made  
12 multiple improper assumptions and further compounded this error by aggregating such  
13 assumptions.  
14

15 **1. Defendant again provides no evidence on which to base any**  
16 **calculations of alleged damages for the class.**

17 Defendant claims to have provided a spreadsheet of persons who were "Business  
18 Bankers". (Def. Not. of Removal, Ex. D, Harris Decl., ¶ 2, Ex. 1 thereto.) That exhibit,  
19 however, lists persons with the titles of "BB," "SBRM" and "BOTH." (*Id.*) Defendant  
20 makes no effort to differentiate when alleged putative class members held the job code  
21 of "Business Banker" and again attempts to include persons outside the class definition  
22 with the Small Business Relationship Manager job code.  
23  
24



1 As Defendant has not broken out the work dates as to when persons held the  
2 "Business Banker" Job code, it is impossible to determine 1) the number of actual class  
3 members who held the job code "Business Banker"; 2) their actual rate of pay while a  
4 Business Banker; 3) their actual dates of employment as a Business Banker; 4) the  
5 number of work-weeks actually worked, i.e., where no vacation, sick time or other  
6 absences were taken while a Business Banker. Defendant's Removal is similarly  
7 devoid of any information as to the hours worked by class members. It must be noted  
8 that this Court previously held that Ms. Harris' prior declaration failed to provide  
9 sufficient evidence on which to make any calculations:

11 ...the Declaration does not identify the weeks or hours actually worked by  
12 the employees. Instead, it states that "employees holding a business banker  
13 or similar title typically work 40 or more weeks per year," "typically work  
14 five or more days a week," and their work days are "typically longer than  
15 five hours." The Declaration contains no exhibits listing the number of  
16 employees or the hours worked during the class period. Nor does it break  
17 down the estimates based on "business bankers" or "similar titles." This  
18 evidence is not sufficient to meet the legal certainty standard. *See*  
19 *Lowdermilk*, 479 F.3d at 1001 ("absent more concrete evidence, it is nearly  
20 impossible to estimate with any certainty the actual amount in  
21 controversy").

22 (Wynne Decl. Ex. 1)

23 Here, the Harris Declaration is even more ambiguous as it simply states that  
24 "employees" "typically work 40 or more weeks per year," (Def. Not. of Remand Ex. D,  
Harris Decl. ¶ 3) "typically work five or more days a week," (*Id.* at ¶ 4) and their work  
days are "typically longer than five hours." (*Id.*) With this scant and woefully  
incomplete information, it is impossible to determine how many hours per day/week  
any putative class member worked; to determine the total damages for overtime based

thereon; to identify how many meals or rest breaks were missed; or to identify how many class members were not paid waiting time penalties.

**2. Plaintiffs' discovery responses do not evidence "bad faith."**

In an attempt to avoid the failure to provide any damages as to the class, Defendant now argues that Plaintiffs' discovery responses are in bad faith and put more than \$5 million at issue. Such claim is false. Defendant points to Paparella's response to Defendant's state court request for admission No. 19, which requested Plaintiff to admit or deny that it was "possible" that class-wide damages "may" exceed \$5 million. (Def. Not. of Removal, Ex. G, Gonnell, Ex. 7, thereto, pg. 206.) What Defendant fails to inform the Court is that Paparella's qualified denial of the request stated, after several objections, that Plaintiffs' lacked sufficient information to enable Plaintiff to admit or deny the request, the reasons for which are made clear herein. Defendant has not provided Plaintiffs information by which to determine the actual class members, the dates of employment, the work weeks worked, the rate of pay, etc. Without this information, neither Plaintiffs nor this Court can make any such determination. Thus, the response was made in good faith.

Next, Defendant claims that Paparella's discovery response stating the he has not calculated the total amount of wages owed is allegedly evidence of bad faith. As stated in *Lowdermilk, supra*, "there are cases-as the instant case proves-in which the plaintiffs cannot anticipate from the outset the value of their case. They are not obligated to overstate their damages to satisfy the defendant's interest in a federal forum, but may plead conservatively to secure a state forum." *Id* at 1003. Moreover, as demonstrated

1 above, Plaintiff did not need to calculate his total damages as they are clearly far lower  
2 than the jurisdictional minimum. Lastly, given that Defendant has first claimed that  
3 Paparella was never a Business Banker and now claims that he was always a Business  
4 Banker, and as Defendant will not state the actual date on which Paparella became a  
5 Business Banker, Plaintiff cannot calculate his potential damages.

6  
7 **3. Defendant cannot meet either the legal certainty or**  
8 **preponderance standard by attempting to use its incorrect**  
9 **damages calculations of Kuznetsov and Paparella or their**  
10 **discovery responses.**

11 As demonstrated, Defendant's calculations of damages for both Plaintiffs  
12 Kuznetsov and Paparella are wildly incorrect. Further, Defendant cannot meet its  
13 evidentiary burden by attempting to use either such calculations or Plaintiffs' discovery  
14 responses as to hours worked or missed meal breaks as an extrapolation to the class.  
15 Defendant's reliance on *Korn v. Polo Ralph Lauren Corp.*, 536 F.Supp.2d 1199 (E.D.  
16 Cal. 2008) and *Nelson v. Bic USA, Inc.* 2008 WL 906049 (S.D. Cal. 2008) to claim that  
17 class-wide damages can be extrapolated from Plaintiffs' alleged amount in controversy  
18 is misplaced. In *Korn*, plaintiffs alleged entitlement to a flat \$1,000 statutory penalty  
19 for each and every member of the class. The court, noting that defendant had proved the  
20 existence of at least 5,001 class members, held the allegation sufficient to establish that  
21 at least \$5 million was in controversy. Similarly, in *Nelson*, plaintiff alleged that each  
22 and every class member was entitled to at \$10 in damages. Finding that defendant  
23 established the existence of at least 500,001 class members to a legal certainty, that  
24 court held the allegation sufficient to establish that at least \$5 million was in

1 controversy. In this action, there are no allegations as to any fixed amount recovery  
2 available as to any class member. Further, Defendant has not proven to a legal  
3 certainty, or even a preponderance of evidence, the actual number of putative class  
4 members. Thus, no extrapolation can be made.

5 Defendant's calculations as to overtime pay are unsupported by any evidence,  
6 based upon incorrect assumptions as to the class members and dates of work and  
7 presumptively assume that each class member worked the same amount of overtime  
8 based upon the discovery responses of the named Plaintiffs. In fact, Defendant proffers  
9 a claim throughout its calculations that the class members allegedly worked a total of  
10 21,160 work weeks but fails to provide any evidence to support this claim. Given that  
11 Defendant has not proven the number of class members, the dates worked, the hours  
12 worked or their rates of pay, and the fact that Defendant has included persons who are  
13 not members of the class as defined by Plaintiff, Defendant's calculations of any class-  
14 wide potential damages for overtime are speculation, at best. A court cannot base  
15 jurisdiction on defendant's speculation and conjecture. *Lowdermilk* at 1002.

17 Defendant compounds its errors in calculating missed meal breaks and waiting  
18 time penalties as it again includes persons who are not members of the class, thus  
19 overstating the weeks worked. In addition to that error, Defendant then assumes that  
20 every class member missed all meal and rest breaks and that each person who  
21 terminated their employment is automatically entitled to the full statutory penalty. (Def.  
22 Not. of Removal, pp. 21-23.) In calculating meal break violations and waiting time  
23 penalties, Defendant may not assume that all class members are entitled to all potential  
24

1 damages. *Lowdermilk* at 1001; *Badia v. Countrywide Fin. Corp.* Not Reported in  
2 F.Supp.2d, 2010 WL 4628001, \*2 (C.D.Cal. 2010); *Munoz v. Central Parking Sys., Inc.*  
3 Not Reported in F.Supp.2d, 2010 WL 3432239, \*2 (C.D.Cal. 2010); *Green v. Staples*  
4 *Contract & Commercial, Inc.*, Not Reported in F.Supp.2d, 2008 WL 5246051, \*4  
5 (C.D.Cal. Dec.10, 2008).

6 Clearly, all of Defendant's "approximations" have been made without any  
7 evidence sufficient to meet the legal certainty standard. *Lowdermilk*, 479 F.3d at 1001.  
8 ("absent more concrete evidence, it is nearly impossible to estimate with any certainty  
9 the actual amount in controversy.") Thus, Defendant fails to satisfy its burden of proof  
10 establishing to a "legal certainty" that the amount in controversy exceeds \$5,000,000.  
11 Plaintiff therefore respectfully submits that this Court has no subject matter jurisdiction  
12 over this matter and this case should be remanded back to state court.

14 **IV. CONCLUSION.**

15 Defendant's Removal fails to show that any named Plaintiff exceeds the  
16 minimum amount in controversy for individual diversity jurisdiction and fails to  
17 provide evidence or proof that Plaintiffs are legally certain to recovery more than the  
18 required \$5,000,000 CAFA minimum in this action. Plaintiffs respectfully request that  
19 this matter be remanded back to the Superior Court of California, County of Orange,  
20 and that the Court award attorney's fees and costs.

22 WYNNE LAW FIRM

23 Dated: August 9, 2011

/S/

24 Edward J. Wynne  
Attorney for the Plaintiff